

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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Docket No. R97-1
POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997)

NASHUA PHOTO INC., DISTRICT PHOTO INC.,
MYSTIC COLOR LAB AND SEATTLE FILMWORKS, INC.
RESPONSE TO NOTICE OF INQUIRY NO. 1
ON INTERPRETATION OF COMMISSION RULES AUTHORIZING
THE USE OF LIBRARY REFERENCES
(October 3, 1997)

Introduction

Nashua Photo Inc. (hereinafter "Nashua"), District Photo Inc. ("District"), Mystic Color Lab ("Mystic"), and Seattle FilmWorks, Inc. ("Seattle") (hereinafter collectively referred to as "NDMS"), proceeding jointly herein, hereby respond to Notice of Inquiry No. 1 issued by the Postal Rate Commission on September 17, 1997 regarding the "Interpretation of Commission Rules Authorizing the Use of Library References."

Listed below, in Section A, are the questions set out in the Commission's Notice of Inquiry No. 1, followed by the NDMS comments. Section B of this Response contains additional comments of NDMS regarding the legal ramifications raised by the Postal Service's interpretation of the Commission's rules with respect to library references.

A. Specific Questions Raised by the Commission, and NDMS Responses

Question 1. Has the Service filed other material in this case as a library reference that does not appear to qualify for that designation under a reasonable interpretation of applicable Commission rules?

Response. Yes. In addition to USPS-LR-H-112, addressed in Notice of Inquiry No. 1, NDMS are aware of other library references that do not appear to qualify for that

designation under a reasonable interpretation of applicable Commission rules. These are listed below.

Although the Postal Service's practice with respect to library reference designation may be considered somewhat loose, NDMS does not take the view that the mere act of labeling a particular document as a library reference is especially problematic, even if the document is not voluminous (as anticipated by the Commission's rules). In fact, it may be a relatively harmless procedure if the party submitting the library reference feels the information in the library reference is information few would want to read, or that inclusion with testimony would be unduly burdensome, or divert the reader, or if the information is in the nature of a secondary source which is provided to facilitate access by other parties. Thus, except for the types of abuse discussed below, the designation of a document as a library reference should not, of itself, create a serious issue in a rate or classification proceeding.

On the other hand (as demonstrated in the recent motions practice of NDMS regarding LR-H-112 in this docket) documents appear to have been designated by the Postal Service as library references so as to avoid the Commission's requirements to submit record evidence in support of its proposals.

Designation of library references becomes abusive if the party offering the library reference offers it with one or more of the following purposes or results: (i) to circumvent the requirement for the presentation of record evidence before the Commission; (ii) to circumvent the requirement that a live witness vouch for the accuracy and reliability of the study (or other information); (iii) to circumvent the requirement that a live witness be made available for written and oral cross-examination; or (iv) to interpose delay and unnecessary discovery and

motions practice and associated expense on intervenors during a statutorily-limited proceeding where every day counts. Regrettably, irrespective of any issue of whether it was intended, the practice of the Postal Service in this docket has had the result of creating these very problems for intervenors.

Question 2. If the answer to No. 1 is in the affirmative,

- a. what numerical designation and title has the Service assigned the material; and**
- b. to what specific proposal does it relate?**

Response.

- a. (i) USPS-LR-H-106 purports to be a study of "Mail Processing Unit Costs by Shape."
- (ii) USPS-LR-H-108 purports to be a study of "Standard Mail (A) Unit Costs by Shape."
- (iii) USPS-LR-H-114 purports to be a study of the "Distribution of Priority Mail Volume into Delivery Method."
- b. (i) USPS-LR-H-106 relates to the development of First-Class Mail rates, as well as Periodicals, and Standard A subclass flat-shaped mail rate categories;
- (ii) USPS-LR-H-108 relates to the Postal Service's proposed Standard A surcharge on non-letter-, non-flat-shaped mail.
- (iii) USPS-LR-H-114 relates to the Postal Service's proposed delivery confirmation services for Priority Mail.

Question 3. Are any revisions to the Commission's rules needed to address practices that have evolved with respect to library references?

Response. Yes. See the various suggestions contained in Part B, *infra*.

B. Additional NDMS Comments Regarding Potential Legal Ramifications

It is critical that rate and classification proceedings before the Commission be conducted fairly, with a view toward development of sound classifications and rates, consistent with the statutory criteria set forth in the Postal Reorganization Act. The statutory provisions are mandatory. See, e.g., 39 U.S.C. sections 3623(b) (the Commission shall consider various factors in setting rates); 39 U.S.C. section 401(c) (rates shall not be unduly discriminatory). The Commission's rules of practice and procedure have been crafted to implement the statutory directives, and are important in carrying them out. They should not be treated as obstructions to reaching "the proper result," to be waived liberally in favor of making "a more complete record." The rules protect the quality of the record, as well as the rights of intervenors; they do not impede the record's proper development.

One indispensable rule is that "relevant and material evidence...shall be admissible." Rule 31(a), Rules of Practice and Procedure, 39 C.F.R. sec. 3001.31(a). Another is that "[d]ocuments and detailed data and information shall be presented as exhibits." *Id.*, Rule 31(b), 39 C.F.R. sec. 3001.31(b). The practice of designating documents as library references confers no evidentiary status whatsoever. *Id.*; P.O. Ruling No. R97-1/4; Special Rule 5.

The Postal Service's practice of designating documents as library references and having witnesses cite them and rely on the conclusions and calculations contained in the documents

may or may not have been planned in an effort to avoid scrutiny of such documents by intervenors and the Commission. Whatever the intention, its effects can be harmful, destroying public confidence in proceedings before the Commission. If the Commission recommends Postal Service proposals which are based upon documents that are not record evidence, the statutory procedures for determining rates and classifications have been undermined, the process loses credibility, and the recommendations may not withstand judicial scrutiny.

The problem with respect to unsponsored library references, like any other inadmissible document, is its tainting effect on the record. The testimony of any number of witnesses may be based upon the data contained in a particular document. If no witness is available to substantiate the underlying document, or even to vouch for its credibility and reliability, the testimony of witnesses, based upon their presumption — but not their knowledge — that the document is reliable, has no place in the evidentiary record. Witnesses have already attested to their false assumptions in reliance upon unsponsored library references. (*See, e.g.*, the response to NDMS/USPS-T32-4.) Thus, unsponsored library references give root to a “poisonous tree” of improper entries in the record.

If the Commission were to determine that the Postal Service had abused the procedures regarding the labeling of documents as library references, and decide to enforce its own rules, we have confidence that the Postal Service would change its practice for the better by filing cases in which witnesses properly sponsored any studies and other information upon which the Postal Service’s case relied, and for which they were willing to vouch, or attaching them as exhibits to their testimony.

Where the Postal Service not only submits studies and other information without offering them as evidence, but also relies upon them as the foundation for its case before the Commission (*i.e.*, witnesses rely on them as if they constituted evidence), real harm can result. Thus, NDMS have argued in their motions practice in this docket that specific portions of the testimony of witness Fronk which relied upon unsponsored (and thus inadmissible) library references should be stricken from the record. The NDMS position is based not only upon technical, legal grounds (their position is clearly founded upon a correct interpretation of the rules), but also upon solid, substantive reasoning¹. Documents that cannot be shown to be reliable, and that no witness would vouch for, have no place in this proceeding.

The problem that has developed now in relying on motions practice by intervenors, to ensure that the Postal Service's presentation is based on record evidence, is that any effort by an intervenor to hold the Postal Service to the Commission's rules seems to result in the Postal Service being given a second or even third chance to cure the defect, and, months after the commencement of the docket, file an entirely new case to support its original proposal, all to the detriment of the intervenors and their rights. In the face of dancing testimony, exhibits and library references, the substantive and procedural due process rights of intervenors are

¹ In addition to these general rules applicable to all documents, as set out in a previous filing section 31 of the Commission's rules of practice and procedure prescribes further conditions for the admissibility of a study (such as LR-H-112). Section 31(k)(1) requires that when a study or analysis is offered into evidence or is relied upon as support for other evidence, there shall be a clear statement of the study plan (to include all relevant assumptions and the techniques of data collection, estimates or testing), and a clear statement of the facts and judgements upon which conclusions are based. The section 31(k) requirements were not met for LR-H-112, and witness Fronk's testimony had no solid basis on which to rest.

considered secondary to undue deference the Postal Service — where it can do whatever it wants, whenever it wants, to “improve” the record. So long as the Postal Service is allowed to amend, revise, supplement, and modify at will, virtually up to the close of the evidentiary record, the playing field becomes tilted badly against intervenors’ individual and collective interests, and in favor of the Postal Service.² The Commission’s requirement that the **entire** case be submitted at the outset of the case (*see* 39 C.F.R. sec. 3001.53) is disregarded, to the detriment of intervenors. It would be remarkable, indeed, if the Postal Service would refrain from taking advantage of such leniency to surprise intervenors with late-filed documents.

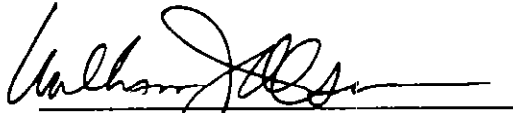
Although these problems could be dealt with on an *ad hoc* basis, the easiest preventative measure would be to require documentary exhibits, including library references, to meet a certain evidentiary threshold. In the case of library references, of course, that **has already been done** by the Commission. Rule 5 of the Commission’s Special Rules of Practice in this proceeding **require** library references to be sponsored by a witness even to be **considered** as documents admissible in evidence. NDMS believe that enforcement of that evidentiary standard is of paramount importance. If witnesses rely on non-record library

² Perhaps no better example of the need for a Postal Service witness to sponsor all library references relied upon substantively at the outset of the case can be found than what has actually happened in this proceeding. Although the Presiding Officer appeared to agree with the NDMS position that witness Fronk’s testimony based upon unsponsored library reference USPS-LR-H-112 had no proper evidentiary foundation, he refused to strike such testimony and instead offered the Postal Service another chance to properly sponsor the library reference. The Postal Service apparently has refused to do this, but has tendered **supplemental testimony** through USPS witness **Sharon Daniel (ST 43)**. Witness Daniel, in not agreeing to sponsor the existing library reference, seems to have admitted that library reference 112 was unreliable, **made numerous substantive revisions** to that library reference, and **essentially created a new library reference through her so-called supplemental testimony**. Clearly, no party, including the Postal Service, should be allowed to revise its case-in-chief at will.

references, such testimony of those witnesses should also be deemed inadmissible. Anything less will impair the rights of intervenors, undermine the system and will lessen public confidence in the Commission's recommendations.

It is sometimes difficult to gauge whether a particular document will be ruled admissible for purposes of a rate proceeding such as this, but in the case of unsponsored library references, the task is made simpler by the Commission's unambiguous rules: a document that is not sponsored is not admissible. In the case of testimony based upon unsponsored library references, the Commission should enforce its own rules. Although striking testimony may be considered extraordinary relief, such relief is nevertheless appropriate on factors such as presented in the NDMS motion. It may spark the ire of the Postal Service, whose arsenal of tactics will be slightly depleted, but when the rules are firmly and consistently enforced, the Postal Service will adjust and, in the long run, all will benefit.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'William J. Olson', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.


William J. Olson

October 3, 1997